APPEAL NO. 93672

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on July 16, 1993, (hearing officer) presiding. The sole issue at the CCH concerned the compensability of claimant's back injury. The report of the Benefit Review Conference framed the issue as whether the claimant's injury to her back that happened on (alleged date of injury), at her home was a compensable injury. The hearing officer at the CCH framed the issue as whether the claimant sustained a compensable back injury on (date of injury). The hearing officer stated that the issue as stated was composed of two sub-issues--1. whether the claimant's fall, at home, on (alleged date of injury), was in the course and scope of her employment, or 2. whether the claimant's fall at home on (alleged date of injury), was directly related to or flowed naturally from her compensable foot injury on (date of injury). The hearing officer concluded that the claimant did not sustain a compensable back injury when she fell on (alleged date of injury). The claimant appeals this decision arguing that her fall on (alleged date of injury), and the resulting injury to her back was caused by her foot giving way due to its condition which resulted from her (date of injury), injury. The carrier responds contending that since claimant failed to prove an injury to her back on (date of injury), or any causal connection between her (date of injury), foot injury and any back injury, the decision of the hearing officer should be affirmed.

DECISION

After reviewing the evidence, we affirm the decision of the hearing officer.

It is undisputed that the claimant injured her right foot on (date of injury), in the course and scope of her employment. The claimant testified that this injury eventually required surgery, a tarsal tunnel release, on her right foot. The claimant testified that subsequent to her surgery she fell at home on (alleged date of injury), while walking up her front sidewalk to get the mail, and in falling injured her back. The claimant testified that as a result of her April 1991 foot injury, her foot would sometimes go numb. The claimant testified that her fall of (alleged date of injury), was caused by her right foot going numb due to the April 1991 injury.

The claimant introduced a medical report from (Dr. T), M.D., which states in part:

> As you know, it is my opinion that your back injury is directly related to your fall and the fall occurred because your foot and right ankle gave way when you got up from a seated position and were walking. All of the medical records I have reflect that opinion, and I would strongly urge that the Texas Workers' Compensation Commission find that your back injury is directly and causally related to your first injury to your foot.

The claimant also introduced a medical report from (Dr. B) which states in part:

During the course of her rehabilitation, she sustained a fall which precipitated a back injury which now resulted in the rupture of a lumbar disc which does require further treatment. At no time during my initial examination, after her injury, did she mention a back injury prior to the fall which is a direct result of the inability to bear full weight on her foot.

The question in this case is whether the injuries suffered by the claimant in her fall of (alleged date of injury), are compensable. Professor L in his treatise on workers' compensation law discusses a number of cases in which injuries resulting from a subsequent fall due to the weakened condition of a member from the primary injury have been held compensable. *See* Larson, Workmen's Compensation Law, Vol. 1 § 13.12(a), pp. 3-546-553 (Matthew Bender, 1992). In Texas Workers' Compensation Commission Appeal No. 93414, decided July 5, 1993, this Panel has cited with approval the following language from Maryland Casualty Co. v. Sosa, 425 S.W.2d 871 (Tex. Civ. App.-San Antonio 1968, *aff'd per curiam*, 432 S.W.2d 515 (Tex. 1968)):

The law is well settled that where an employee sustains a specific compensable injury, he is not limited to compensation allowed for that specific injury if such injury, or proper or necessary treatment therefor, causes other injuries which render the employee incapable of work.

In Appeal No. 93414, *supra*, we affirmed a hearing officer who found that a knee injury caused a subsequent back injury by requiring the claimant to alter his gait, when there was conflicting medical evidence as to causality. Our decision in Appeal No. 93414 is partly predicated on our earlier decision in Texas Workers' Compensation Commission Appeal No. 92538, decided November 25, 1992, which the claimant in the present case cited at the hearing, and in which we affirmed a hearing officer who found that the claimant's physical therapy treatment for carpal tunnel syndrome had resulted in an injury to her back and hip. Further, we affirmed the hearing officer in Texas Workers' Compensation Commission No. 93664, decided September 15, 1993, who held that the claimant had not yet reached MMI due to depression resulting from her back and neck injuries. In Texas Workers' Compensation Commission No. 92553, decided November 30, 1992, upon which carrier relies in the present case, we affirmed a hearing officer who found that the claimant's injury to his wrist and thumb were not caused by a fall at home on his unsteady injured knee.

These cases would indicate that the issue of whether the subsequent injury was caused by the compensable injury or the proper and necessary treatment of it is one of fact. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no

writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard we have held in some cases the evidence to be insufficient to support the finding of the hearing officer that the subsequent injury was caused by the compensable injury or treatment thereof. *See* Texas Workers' Compensation Commission Appeal No. 93574, decided August 24, 1993; Texas Workers' Compensation Commission Appeal No. 93612, decided September 3, 1993. In the present case there is sufficient evidence in the record to support a finding that the original injury caused the subsequent fall and back injury, but we do not believe that the finding of the hearing officer that such causality did not exist is so against the great weight and preponderance of the evidence as to require reversal. It was up to the hearing officer to determine what weight to give to the testimony of the claimant. Also, the opinion of the doctors as to the cause of the fall were clearly based upon the history provided by the claimant. The history of an incident given by a patient to a doctor is not proof of the truth of the patient's statements to the doctor. Texas Employers' Insurance Association v. Butler, 483 S.W.2d 530, 534 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.).

We, therefore, affirm the decision of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge